

DEC 30 2005

For The Northern Mariana Islands  
By \_\_\_\_\_  
(Deputy Clerk)IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN MARIANA ISLANDS

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAI, XIAO JUN,

Defendant.

Case No. CR-05-00022

**ORDER DENYING IN PART AND  
GRANTING IN PART DEFENDANT'S  
MOTION TO SUPPRESS**

THIS MATTER came before the court on Thursday, December 15, 2005, for hearing of Defendant's motions to suppress evidence obtained from three searches and seizures. Plaintiff appeared by and through its attorney, Assistant U.S. Attorney Jamie D. Bowers; defendant appeared personally and by and through his attorney, Robert T. Torres.

Defendant is charged in a two count indictment for trafficking in counterfeit goods in violation of 18 U.S.C. § 2320, and unlawful possession of a controlled substance with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(B).

Defendant filed two motions to suppress under Federal Rule of Criminal Procedure 12(b)(3). Defendant based his motions on U.S. statute and regulation, the Fourth Amendment of the U.S. Constitution, and the Commonwealth of the Northern Mariana Islands ("Commonwealth" or "CNMI") Constitution. First, Defendant contends that the search of the intercepted parcel ("first search") violates 19 U.S.C. § 1582 and 19 C.F.R. § 145.2 and, therefore, the evidence obtained and the fruits of the evidence obtained from the first search must be excluded from the trial. Defendant also claims that the first search violated the Fourth Amendment of the U.S. Constitution and Article

1, § 3 and § 10 of the Commonwealth Constitution.

Second, Defendant contends that the warrantless search of his apartment ("second search") was an illegal search and seizure in violation of the Fourth Amendment to the U.S. Constitution and Article I, § 3 and § 10 of the Commonwealth Constitution on three separate bases: (1) it is tainted by the first search; (2) it does not fall within any exception to the search warrant requirement; and (3) the Government lacked the requisite probable cause and exigent circumstances for such a warrantless search.

Third, Defendant contends that the warrant authorizing the search of his apartment ("third search") was tainted as fruits of the alleged illegal second search.

The Government responds that Defendant's motion to suppress is untimely, that the first search did not violate any statute or regulation, and that the second search falls under the exigent circumstances exception to the warrant requirement. The Government also responds that even if the second search violated the warrant requirement of the Fourth Amendment, application of the exclusionary rule is not proper because the "independent source doctrine" applies.

THE COURT, having fully considered the written and oral arguments of the parties, hereby denies Defendant's motion to suppress the evidence from the first search, and grants Defendant's motion to suppress the evidence from the second search and the third search.

## **I. BACKGROUND**

This motion relates to three consecutive searches. The first search occurred in San Francisco, California at a Customs and Border Protection ("CBP") Mail Facility. The second search occurred without a warrant at Defendant's apartment. The third search, which occurred about four hours after the second search, was conducted with a warrant.

The court makes the following finding of facts based on the moving papers and the

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1 evidentiary hearing.<sup>1</sup>

2 **A. Search of Intercepted Parcel in San Francisco**

3 On June 12, 2005, a parcel in the form of a box ("Package") was intercepted at the CBP Mail  
4 Facility in San Francisco, California.<sup>2</sup> The package had been express mailed via the Chinese and  
5 United States government postal system from Zhu Jun in China. On the exterior of the Package is an  
6 EMS packaging sticker and pictures of a Kenuo DVD / VCD player with Chinese writing, similar to  
7 a box used by a manufacturer in packaging new DVD players for sale. It was addressed to Chen  
8 Jian, PMB 212, P.O. Box 10002, Saipan, MP 96950. Post Office Box 10002 belongs to a permitted  
9 Commercial Mail Receiving Agency known as BBB or Golden Crown Market. PMB is located  
10 inside the Golden Crown Market and belongs to a Bai Yan but lists Dai Yan and Defendant, Xiao  
11 Jun Dai, as authorized persons to receive mail at that address.

12 At the San Francisco CBP Mail Facility and without a warrant, CBP Officer F. Orozco  
13 performed an x-ray scan of the Package.<sup>3</sup> Based on the x-ray scan, CBP Officer Orozco noticed that  
14 there were pill-shaped items concealed inside a larger item similar to a DVD player. Again without a  
15 warrant, CBP Officer Orozco opened the Package and found a DVD player. CBP Officer Orozco  
16 then opened the DVD player and discovered about 2.75 kilograms of blue diamond-shaped pills  
17 imprinted with the word "pfizer" inside the DVD player.<sup>4</sup> FDA inspector Bobby Smith inspected the  
18 Package at the San Francisco CBP Mail Facility and observed that the pills were consistent with  
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21 <sup>1</sup> Because the parties mainly contest issues of fact relating to the validity of the search, the court held  
22 an evidentiary hearing. Whether an evidentiary hearing is appropriate rests in the reasoned discretion  
of the court. *United States v. Walczak*, 783 F.2d 852, 857 (9th Cir. 1986).

23 <sup>2</sup> All mail from China to the Commonwealth is routed to San Francisco before entering the  
24 Commonwealth.

25 <sup>3</sup> About seventy-five percent of all packages are scanned by x-ray.

26 <sup>4</sup> No evidence was provided by either side as to whether the DVD player was operable, i.e. whether  
or not the DVD player had been "guttled" to make room for the pills.

1 counterfeit Viagra pills that he had encountered on previous occasions.

2 When the pills where discovered, CBP officers notified Special Agent Michael Simpson  
3 from Immigration and Customs Enforcement ("ICE") in San Francisco, who took control of the  
4 Package and its contents. After removing the tablets and sending a portion of the pills to a local  
5 laboratory for testing, the Government forwarded the Package to ICE Resident Agent-in-Charge  
6 ("RAC") in Guam for reassembly and a controlled delivery.<sup>5</sup>

#### 7 8 **B. Warrantless Search of Defendant's Apartment**

9 On or around June 15, 2005, to prepare for a controlled delivery, ICE Special Agent Matthew  
10 Goward asked CNMI Department of Labor and Immigration Major Edward Cabrera to run a  
11 background check on Chen Jian, the addressee of the Package, and Xiao Jun Dai, a person  
12 authorized to receive mail at PMB 212. Major Cabrera conducted a search in the Labor and  
13 Immigration Identification and Documentation System ("LIIDS") and found no record for Chen Jian  
14 but found a record on Defendant, Xiao Jun Dai. The LIIDS record indicated that Defendant had been  
15 employed by Liao Ti Corporation since at least May 11, 2004. No witness indicated whether any  
16 officer ran a background check on Bai Yan, the owner of PMB 212, or Dai Yan, the other person  
17 authorized to receive mail at PMB 212.

18 Major Cabrera reported to Special Agent Goward that there was a LIIDS record for Xiao Jun  
19 Dai but no LIIDS record for Chen Jian. Major Cabrera also told Special Agent Goward that sources  
20 connect Xiao Jun Dai to prostitution, illegal gambling and / or controlled substances. Major Cabrera  
21 also told Special Agent Goward that Xiao Jun Dai was living in western Garapan. Major Cabrera  
22 testified that he failed to tell Special Agent Goward that the LIIDS report indicated that Defendant  
23 was employed by Liao Ti Corporation. No officer attempted to locate the Liao Ti Corporation or

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25 \_\_\_\_\_  
26 <sup>5</sup> No testimony or affidavit explained exactly how the Package was transported from San Francisco to Guam.

1 Xiao Jun Dai's residence.

2 On June 17, 2005, the ICE RAC in Guam received the Package. On June 29, 2005, the  
3 Package was prepared for a controlled delivery: "Clue spray," a substance that can be detected under  
4 ultraviolet light, was applied to the inside of the DVD player, M&Ms as sham Viagra pills were  
5 inserted inside the DVD player, and the Package was reconstructed to its approximate original  
6 appearance.

7 In its brief, but without a supporting affidavit, the Government claimed that the officers  
8 installed an electronic tracking device ("device") in the Package. Furthermore, while the  
9 Government, in its brief, only indicated that one electronic tracking device had been installed in the  
10 Package, during the evidentiary hearing Special Agent John Duenas of the U.S. Immigration and  
11 Customs Enforcement indicated that two electronic tracking devices had been installed in the  
12 Package. Several other officers indicated that they had been aware that electronic tracking devices  
13 were being used during the search. Accordingly, the court finds that two electronic tracking devices  
14 had been installed in the Package. One device, the Bird Dog, a directional frequency emitter, had the  
15 ability to indicate the general location of the tracking device, that is whether the device was to the  
16 front, back, left or right of the receiver. The other tracking device, model LBA-1, was the size of a  
17 credit card and could not emit a directional frequency. Both devices were configured to emit special  
18 frequencies when the DVD player was opened and when the device was in motion.

19 On June 29, 2005, the officers began the controlled delivery to the address on the Package,  
20 PMB 212, P.O. Box 10002, Saipan, MP 96950. At around noon, Postal Inspector Craig Hales placed  
21 the Package into P.O. Box 10002 located at the main post office in Saipan. Agent Hales conducted  
22 surveillance and observed who he thought was a Golden Crown Market representative come to the  
23 box and pick up the mail placed in P.O. Box 10002. Agent Hales observed the representative pick up  
24 the Package and place it in a beige Toyota van.

25 Officers conducting surveillance observed the van drive North on Beach Road toward  
26 Garapan and stop in front of the Golden Crown Market on Micro Beach Road. Officers observed the

1 Package being unloaded from the van and taken into the Golden Crown Market.

2 At around 5:55 p.m., Major Cabrera was positioned about 150 feet from the Golden Crown  
3 Market. At that time, he observed a person dressed in black riding a bicycle arrive at the Golden  
4 Crown Market. Unable to identify the person with the naked eye, Major Cabrera, with the aid of  
5 binoculars, identified the person by name as Defendant. Major Cabrera, however, was not able to  
6 notice the details of Defendant's attire, such as Defendant's shoes. Major Cabrera saw Defendant  
7 leaving the Golden Crown Market with the Package but did not follow Defendant. Other officers  
8 followed Defendant from the Golden Crown Market going south and towards the Promenade area in  
9 western Garapan.

10 Unable to drive into the Promenade area, Special Agent Duenas was dropped off a block  
11 away from Defendant. Although he lost sight of Defendant, Special Agent Duenas had caught up to  
12 Defendant right as Defendant entered the Liao Ti Tour Agency. An officer identified the bicycle  
13 parked in front of the Liao Ti Tour Agency as one similar to Defendant's bicycle. In addition, the  
14 Bird Dog, a directional frequency emitter, indicated that Defendant may have entered the tour  
15 agency. Because the device had not indicated that it had been opened, the officers assumed that the  
16 Package was still intact. With this belief, they waited outside of the Liao Ti Tour Agency.

17 After about fifteen minutes at around 6:10 p.m., the receiver indicated that the DVD player  
18 had been opened. At that time, the officers rushed into the Liao Ti Tour Agency, with guns drawn.  
19 The officers proceeded to question Ms. Huang Min Hui, an employee of the agency who was the  
20 only person present. Ms. Huang verified that the bicycle belonged to Defendant. Finding no other  
21 way out except the front door and a secret door hidden behind a mirror, the officers "surmised that  
22 [Defendant] had absconded through a secret door hidden behind a mirror in the rear of the business."  
23 Report of Investigation by Special Agent Goward, Exhibit A. No testimony suggests how or when  
24 any officer found the secret door or whether the mirror that was to hide the secret door was in place  
25 when an officer actually found the hidden door.

26 Not able to find Defendant, the officers continued to question Ms. Huang. Ms. Huang

1 indicated that Defendant lived in an apartment complex located in the alley at the rear of the Liao Ti  
2 Tour Agency. In Ms. Huang's affidavit, she stated under penalty of perjury that, with guns drawn,  
3 the officers forcibly led Ms. Huang to the three storey apartment complex located in the alley at the  
4 rear of the Liao Ti Tour Agency. Ms. Huang stated that despite telling the officers that she did not  
5 know which apartment in the complex was Defendant's apartment, at each floor and at each  
6 different unit door, the officers asked Ms. Huang, "Is this the one?" Each floor has two apartments.

7 An officer on the scene, Special Agent Duenas, testified in court that he was not aware of  
8 how Ms. Huang was brought to the apartment complex as he was already at the complex when she  
9 arrived. However, when Ms. Huang arrived, Special Agent Duenas asked her to identify the  
10 apartment that Defendant lived in. Ms. Huang answered that she did not know. Then, officers  
11 walked Ms. Huang to the second floor. Special Agent Duenas, while pointing to one of the two  
12 apartments on the second floor then asked, "This one or this one?" Ms. Huang responded that she  
13 did not know. Ms. Huang was escorted to the third floor. Special Agent Duenas asked again, "This  
14 one or this one?" Ms. Huang responded that she did not know. Then, based on Ms. Huang's body  
15 language, Special Agent Duenas believed that Defendant's apartment was B-3.

16 The court, weighing the affidavit against the testimony of the live witness, adopts Special  
17 Agent Duenas' construction of the facts. Special Agent Duenas had been working for five years in  
18 the U.S. Immigration and Customs Enforcement office in Guam. During that time he attended  
19 numerous training classes relating to the dynamics of body language. With such experience and the  
20 fact that it is well known that an officer such as Special Agent Duenas routinely interprets body  
21 language in the course of his duties, Special Agent Duenas had the knowledge and experience to  
22 interpret Ms. Huang's body language at that time. Furthermore, Special Agent Duenas' demeanor on  
23 the stand was relaxed and his testimony was consistent and believable.

24 The Government claims that while the officers were trying to determine which apartment  
25 was Defendant's apartment, Drug Enforcement Administration ("DEA") Task Force Agent ("TFA")  
26 Albert Palacios identified shoes left at the entrance to Apartment B-3 as those similar to the shoes



1 Defendant was wearing. However, when TFA Palacios testified in court, TFA Palacios denied  
2 making such an identification. Furthermore, TFA Palacios testified that the only time that he could  
3 have seen Defendant's shoes was when Defendant picked up the Package at the Golden Crown  
4 Market. During that time, however, TFA Palacios did not have binoculars and could not see  
5 Defendant's shoes. Furthermore, even Major Cabrera, who had binoculars, could not recall the type  
6 of shoes Defendant was wearing at the time. In addition, TFA Palacios would not have been  
7 physically present to identify the shoes before the officers gained entrance into Apartment B-3  
8 because, according to his testimony, TFA Palacios did not arrive at Apartment B-3 until after the  
9 officers gained entrance. Accordingly, the court finds that no such identification of the shoes was  
10 made.<sup>6</sup>

11 Thereafter, an officer knocked on the apartment door and announced that they were law  
12 enforcement officers. Special Agent Duenas testified that he heard Special Agent Goward say that he  
13 heard shuffling noises from within the apartment.<sup>7</sup> The officers then forcibly entered the apartment.  
14 Defendant did not give the officers consent to enter or search the apartment. Defendant was not  
15 presented with a search warrant.

16 The Government's articulated basis for entering Defendant's apartment was "to preserve the  
17 evidence from being destroyed." Report of Investigation by Special Agent Goward, Exhibit A.  
18 However, the Government did not present to the court either by affidavit or live testimony any  
19 evidence of what the Government believed would have been destroyed, i.e. whether they were  
20 concerned that the DVD player would be put back together, whether Defendant would have washed  
21 off the clue spray, whether it is possible to wash off the clue spray, and / or whether Defendant  
22 would have flushed the M&Ms down the toilet.

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24 <sup>6</sup> The Government stated that officers participating in the controlled delivery included an Albert  
25 Palacios and Albert Taitano, which may have caused confusion. However, the Government did not  
submit any evidence supporting this claim.

26 <sup>7</sup> No one testified as to how loud or what type of shuffling noise Special Agent Goward heard.



1 After the officers forced entry into Apartment B-3, the officers conducted a warrantless  
2 search of the apartment. Apartment B-3 is a small two-bedroom apartment with a small living room  
3 area and an adjacent kitchen area. The Government's articulated basis for the search, according to  
4 Special Agent Goward, was a safety sweep of the apartment "for other subjects or dangerous  
5 weapons." Report of Investigation by Special Agent Goward, Exhibit A.

6 During the warrantless search, Defendant was found in a bedroom and secured and  
7 handcuffed on the living room floor. An officer examined Defendant's hands with an ultraviolet  
8 light and discovered the presence of "Clue" spray. A few minutes later, Defendant was lifted up and  
9 placed in a chair near the kitchen and next to the refrigerator.

10 Special Agent Goward observed portions of what he identified as sham Viagra, *i.e.* M&Ms,  
11 tablets "on the desk in the bedroom, along with labels marked Viagra, and prescription bottles on the  
12 bed." Report of Investigation by Special Agent Goward, Exhibit A.

13 In his affidavit, Defendant stated under penalty of perjury that during the warrantless search  
14 and before a warrant was obtained, Defendant saw whom he believes to be TFA Palacios open the  
15 freezer, pick up items from the freezer, and open a clear plastic bag. TFA Palacios took out the  
16 object, which was covered in a cloth sheet, from the clear plastic bag. TFA Palacios removed the  
17 sheet, revealing a carton package. Then TFA Palacios opened the carton package. TFA Palacios  
18 said "marijuana" in English, closed the package, and returned the object to the freezer. However, in  
19 court TFA Palacios testified that he did not search the freezer until after the warrant was obtained.  
20 The court, considering TFA Palacios' credibility and demeanor on the stand and Defendant's  
21 statements made in his affidavit under penalty of perjury, finds that TFA Palacios did not search the  
22 freezer until after the warrant was obtained.

23 In his affidavit, Defendant also stated that he could hear officers opening closets and drawers  
24 and other smaller items in the apartment during the warrantless search. Special Agent Duenas,  
25 however, testified in court that the warrantless search was brief and confined to ensuring the  
26 officers' safety and that no officers searched through drawers or other smaller items in the

1 apartment. The court, considering the Special Agent Duenas' credibility and demeanor on the stand  
2 and Defendant's statements made in his affidavit under penalty of perjury, finds that neither TFA  
3 Palacios nor any other officer had searched the drawers or other smaller items until after the warrant  
4 was obtained.

5       Around twenty minutes after the warrantless search, Defendant and Ms. Huang were taken  
6 into custody. TFA Palacios, however, testified that Defendant was not taken into custody and  
7 brought to the district courthouse but, instead, that he himself supervised Defendant for the next  
8 three hours while the other officers were obtaining a warrant. This court finds otherwise. Many other  
9 officers and witnesses testified in court or by affidavit that Defendant was taken into custody. This  
10 includes Ms. Huang in her affidavit, Special Agent Goward in his affidavit supporting the search  
11 warrant, and Special Agent Duenas on the witness stand. The court, in considering the credibility of  
12 the witnesses and affiants along with the corroborating facts that indicate the reliability of the  
13 testimony and affidavit, finds that Defendant was taken into custody around twenty minutes after the  
14 officers forcibly entered the apartment.

### 15 16                   **C. Third Search: Search with Warrant at Defendant's Apartment**

17       Several hours after the initial entry into Apartment B-3, at approximately 10 p.m., Special  
18 Agent Goward obtained a court-authorized search warrant and searched the apartment. During that  
19 search, without Defendant present, the officers found prescription bottles labeled "Viagra" in  
20 Defendant's bedroom. Labels printed with Viagra information, Viagra fact sheets, and Viagra  
21 quality seals were also found in the bedroom. United States and Japanese currency was also found.  
22 TFA Palacios found a clear plastic bag in the freezer containing a green leafy substance wrapped in  
23 a cloth sheet.

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## II. TIMELINESS OF MOTIONS

On July 13, 2005, Defendant pled not guilty to the charges against him. That same day, Defendant made a motion, which the court granted, for pretrial motions to be due by August 15, 2005. Order Setting Trial Date, No. 6 (July 13, 2005). On August 11, 2005, the parties entered into a stipulation requesting the court to schedule a waiver of speedy trial hearing “to allow Defendant to further assist counsel in preparation of the case, including reviewing additional discovery and considering pretrial motions, and for the parties to [make] further discussions toward pretrial resolution.” Stipulated Motion to Reset Jury Trial Date and Set Hearing for Waiver of Speedy Trial Right, No. 10 (Aug. 11, 2005). The court, while a visiting judge was presiding, granted the motion to “allow the defense further time to review the evidence in preparation for trial.” Order Granting Waiver of Speedy Trial and Amending Scheduling, No. 12 (August 12, 2005). Defendant filed his first motion to suppress on October 11, 2005 and his second motion to suppress on November 18, 2005.

Unless good cause is shown, failure to raise a timely pretrial motion constitutes a waiver of such defense or objection. *See* Fed. R. Crim. Pro 12(f) (“Failure by a party to raise defenses or objections or to make requests which must be made prior to trial . . . shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.”). Under LCrR 12.1, “[t]he court upon motion and for good cause shown may extend the time for filing motions.”

Considering the facts of this case, the court considers the August 11, 2005, Stipulated Motion as the appropriate motion extending the time for filing pretrial motions. In the order granting the Stipulated Motion, the court stated that “Defendant waived his right to speedy trial and moved to continue his trial date in order to allow for additional time to effectively prepare his case.” Stipulated Motion to Reset Jury Trial Date and Set Hearing for Waiver of Speedy Trial Right at 1, No. 10 (Aug. 11, 2005). Neither Defendant nor the Government moved to set a cut-off date for pretrial motions. Furthermore, in granting the motion the court considered whether good cause existed to amend the scheduling: “The [c]ourt finds . . . that the ends of justice [is] served by allowing the

1 defense further time to review the evidence in preparation for trial.” *Id.*

2 Accordingly, in the interest of justice, the court deems the waiver of speedy trial to have  
3 included a motion for an extension of time to file pretrial motions. The court finds Defendant’s  
4 motions are timely.

### 5 6 7 **III. MOTION TO SUPPRESS GROUNDED ON STATUTE**

8 Defendant claims that customs inspectors lack authority under 19 U.S.C. § 1582 and 19  
9 C.F.R. § 145.1 to search international mail not destined for delivery within the customs territory of  
10 the United States, *i.e.* the Commonwealth.<sup>8</sup> Defendant continues that because the government  
11 officers went beyond their scope of authority, the court must suppress the evidence obtained from  
12 that violation. The Government responds that the customs inspectors had the requisite authority.  
13 Regardless of the alleged violation, however, the court may not adjudicate an issue for which it lacks  
14 jurisdiction. Accordingly, the court *sua sponte* questions its subject matter jurisdiction.

15 As an Article IV court, the jurisdiction of the District Court of the Northern Mariana Islands  
16 is defined by 48 U.S.C. § 1821, which authorizes the court to exercise jurisdiction equivalent to an  
17 Article III court. Moreover, section 402(a) of the Covenant to Establish a Commonwealth of the  
18 Northern Mariana Islands in Political Union with the United States of America, 48 U.S.C. §1801  
19 (1976) [hereinafter Covenant], states that “[t]he District Court of the Northern Mariana Islands will  
20 have the jurisdiction of a district court of the United States, except that in all causes arising under the  
21 Constitution, treaties or laws of the United States it will have jurisdiction regardless of the sum or  
22 value of the matter in controversy.” Accordingly, like an Article III court, the District Court of the

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24 <sup>8</sup> Section 603(a) of the Covenant provides: “The Northern Mariana Islands will not be included  
25 within the customs territory of the United States.” 19 C.F.R. § 145.2(b), implemented under the  
26 authority created by 19 U.S.C. § 1582, states in relevant part: “All mail arriving from outside the  
Customs territory of the United States and all mail arriving from outside the U.S. Virgin Islands  
which is to be delivered within the U.S. Virgin Islands, is subject to Customs examination . . . .”

1 Northern Mariana Islands is also limited to the resolution of “cases or controversies.” *See United*  
2 *States v. Virgin Islands*, 363 F.3d 276, 285 n.3 (3d Cir. 2004) (noting that the “case or controversy”  
3 requirement applies to the District Court of the Virgin Islands because, although it is an Article IV  
4 court, “it is authorized by [48 U.S.C. § 1612] to exercise jurisdiction equivalent to an Article III  
5 court.”).

6 One requirement of a case or controversy is that Defendant must have standing to bring this  
7 motion to suppress evidence obtained from Search 1. Plaintiff has standing if (1) he has an actual  
8 injury, *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990), (2) caused by the illegal conduct of the  
9 Government, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), (3) that is likely to be  
10 redressed if the requested relief is granted, *Vermont Agency of Natural Resources v. United States ex*  
11 *rel. Stevens*, 529 U.S. 765, 771 (2000).

12 Here, the problem with Defendant’s motion to suppress evidence obtained from Search 1 is  
13 that Defendant fails to meet the third prong, redressability. The redressability requirement is  
14 satisfied when Plaintiff shows a “‘substantial likelihood’ that the requested relief will remedy the  
15 alleged injury in fact.” *Id.* (quoting *Simon v. Eastern Kentucky Welfare Rights Organization*, 426  
16 U.S. 26, 45 (1976). Here, the alleged injury in fact is the search of the Package in violation of § 1582  
17 and § 145.2. Plaintiff contends that exclusion of the evidence and of the fruits of the evidence  
18 obtained from the alleged illegal search is substantially likely to remedy the alleged injury.  
19 However, the relief, i.e. suppression, is not available to him for the alleged injury.

20 “Absent a constitutional violation or a congressionally created remedy, violation of an  
21 agency regulation does not require suppression of evidence.” *United States v. Ani*, 138 F.3d 390, 392  
22 (9th Cir. 1998); *see United States v. Caceres*, 440 U.S. 741, 755 (1979). Thus, for the exclusionary  
23 rule to apply, Defendant must show that Congress, or at least the U.S. Customs Service “explicitly or  
24 implicitly provided exclusion as a remedy for a violation of [the] statute.” *United States v.*  
25 *Thompson*, 936 F.2d 1249, 1251 (11th Cir. 1991). Defendant has not provided any proof of  
26 Congress’s intent to create the exclusionary rule as a remedy for this alleged violation. In fact, the

1 Ninth Circuit in *Ani* deemed that “[t]here is nothing to indicate that Congress or the United States  
2 Customs Service intended the exclusionary rule to be a remedy for violation of 19 U.S.C. § 1582 or  
3 19 C.F.R. § 145.1.” 138 F.3d at 392.

4 Defendant asserts that the Ninth Circuit in *United States v. Whiting*, 781 F.2d 692, 696 (9<sup>th</sup>  
5 Cir. 1986), supports his assertion that the exclusionary rule applies if customs officers do not have  
6 authority to search mail arriving from outside the Customs territory of the United States (i.e. China)  
7 which is to be delivered *outside* the Customs territory of the United States (i.e. the Commonwealth).  
8 However, even if 19 C.F.R. § 145.2 does not give the customs officers this authority, the Ninth  
9 Circuit’s opinion in *Whiting* does not support Defendant’s contention that the exclusionary rule  
10 applies. In *Whiting*, the Ninth Circuit held that agents of the Office of Export Enforcement of the  
11 Department of Commerce do not have authority to conduct a border search and detain packages at  
12 the post office “because Customs has full authority to conduct warrantless border searches of  
13 outgoing packages . . . .” *Whiting*, 781 F.2d at 698 n.14.

14 The Ninth Circuit in *Whiting* based its decision on *United States v. Soto-Soto*, 598 F.2d 545,  
15 550 (9th Cir. 1979), which expressly distinguished a violation of authority derived from the U.S.  
16 Constitution and statute, where the exclusionary rule applies, and a violation of authority derived  
17 from regulations, where the exclusionary rule does not apply. In both *Whiting* and *Soto-Soto*, the  
18 searching officers violated a statute that authorized only customs officers to search mail and so the  
19 exclusionary rule was applicable. *Whiting*, 781 F.2d at 698; *Soto-Soto*, 598 F.2d at 550. Here,  
20 however, there was a regulatory violation, *i.e.* 19 C.F.R. § 145.2, and not a statutory or constitutional  
21 violation.

22 Most importantly, the difference between *Whiting* and *Soto-Soto* and this case is that in those  
23 two cases, the search agents were agents of the Office of Export Enforcement of the Department of  
24 Commerce and FBI agents, respectively, and not customs officers. There has been a long history of  
25 express authority granted to customs officers to “stop, search, and examine, as well without as  
26 within their respective districts, any vehicle or person, on which he or they shall suspect there is

1 merchandise which is subject to duty, or shall have been introduced into the United States in any  
2 manner contrary to law.” *Alexander v. United States*, 362 F.2d 379, 381 (9th Cir. 1966) (quoting 19  
3 U.S.C. § 481).

4 In conferring upon Customs officers such broad authority, circumscribed only by  
5 Constitutional limitations of the Fourth Amendment, the Congress has in effect declared  
6 that a search which would be ‘unreasonable’ within the meaning of the Fourth  
7 Amendment, if conducted by police officers in the ordinary case, would be a reasonable  
8 search if conducted by Customs officials in lawful pursuit of unlawful imports.

9 As such, only customs officers may perform border searches and border searches performed by non-  
10 customs officers or equivalent to non-custom officers are subject to the exclusionary rule.

11 There must be an “exceptional reason . . . to invoke the exclusionary rule.” *United States v.*  
12 *Harrington*, 681 F.2d 612, 615 (9th Cir. 1982). This is not one of them. Accordingly, Defendant’s  
13 motion to suppress based on the Government’s violation of 19 U.S.C. § 1582 or 19 C.F.R. § 145.1  
14 is denied.

#### 15 16 **IV. MOTION TO SUPPRESS GROUNDED ON U.S. CONSTITUTION**

17 Defendant moves the court to suppress the evidence and fruits of the evidence obtained from  
18 the first search, the second search, and the third search based on Fourth Amendment of the U.S.  
19 Constitution.

20 The Fourth Amendment of the U.S. Constitution applies to the Northern Mariana Islands  
21 through section 501(a) of the Covenant to Establish A Commonwealth of the Northern Mariana  
22 Islands in Political Union with the United States of America (“Covenant”), 48 U.S.C. § 1801. The  
23 Fourth Amendment provides:

24 The right of the people to be secure in their persons, houses, papers, and effects, against  
25 unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but  
26 upon probable cause, supported by Oath or affirmation, and particularly describing the  
place to be searched, and the persons or things to be seized.



1 Accordingly, all government searches must be reasonable. *Id.*

2 The Government does not dispute that it conducted a search within the meaning of the Fourth  
3 Amendment. *See United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (“A ‘search’ occurs when an  
4 expectation of privacy that society is prepared to consider reasonable is infringed.”). Accordingly,  
5 the only issue in dispute is whether the searches were reasonable. If the court finds that the search  
6 was not reasonable, the court must, under *Weeks v. United States*, 232 U.S. 383, 398 (1914), suppress  
7 the illegally obtained evidence.

8  
9 **A. First Search: Search of Intercepted Parcel in San Francisco, CA**

10 Defendant claims that his Fourth Amendment rights were violated when CBP Officer F.  
11 Orozco scanned the Package by x-ray and then opened the Package. However, Fourth Amendment  
12 rights are personal and may not be vicariously asserted. *Rakas v. Illinois*, 439 U.S. 128, 133-34  
13 (1978). “A person who is aggrieved by an illegal search and seizure only through the introduction of  
14 damaging evidence secured by a search of a third person’s premises or property has not had any of  
15 his Fourth Amendment rights infringed.” *Rakas*, 439 U.S. at 134. Given the totality of the  
16 circumstances, “[Defendant] must have manifest[e]d a subjective expectation of privacy in the  
17 [object] searched, and [his] expectation must [have] been one that society would recognize as  
18 objectively reasonable.” *United States v. Sarkisian*, 197 F.3d 966, 986 (9th Cir. 1999).

19 Generally, only the sender and the addressee have a privacy interest in a mailed parcel. *United*  
20 *States v. Hernandez*, 313 F.3d 1206, 1209 (9th Cir. 2002). Defendant, however, was neither the  
21 sender nor the addressee of the Package.

22 Defendant urges the court to adopt *United States v. Sheldon*, 351 F. Supp.2d 1040 (D. Haw.  
23 2004) for the proposition that this case is a situation where Defendant has a protectable privacy  
24 interest in mail that was neither sent by or addressed to him. Regardless of whether a third party may  
25 have a protectable privacy interest in mail, Defendant has not articulated a basis for his privacy  
26 interest in the Package. Specifically, he has not claimed ownership of the DVD player or the

1 counterfeit Viagra pills that were inside the DVD player. Furthermore, Defendant has not claimed  
2 that the addressee on the package, Chen Jian, is a fictitious name that he uses to receive mail.  
3 Moreover, there was no indication in the facts that Defendant was the owner of the DVD player or  
4 the counterfeit Viagra pills. Unlike in *Sheldon*, there was no indication that Defendant was not simply  
5 the downstream purchaser rather than the owner of the counterfeit Viagra.

6       However, even if Defendant had standing to challenge the first search, the Government has  
7 met its burden of proving that the warrantless search was reasonable. *See Katz v. United States*, 389  
8 U.S. 347, 357 (1967) (A search conducted without a warrant is presumed unreasonable and it is the  
9 Government's burden to prove that the warrantless search is reasonable.). Here, the Government  
10 claims that the border search exception to the warrant requirement made it reasonable for it to search  
11 the Package.

12       The United States Supreme Court has long held that a border search, for Fourth Amendment  
13 purposes, need not take place at the actual physical border, but may also occur at its "functional  
14 equivalent." *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973). Here, the search took place  
15 at the CBP Mail Facility in San Francisco, California. The San Francisco CBP Mail Facility handles  
16 all mail traveling from China to the Commonwealth. Therefore, the San Francisco CBP Mail Facility  
17 is the "border" for purposes of the border search exception. *See United States v. Ramsey*, 431 U.S.  
18 606, 609 n.2 (1977).

19       Under the border search exception to the warrant requirement, "[r]outine searches of the  
20 persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable  
21 cause, or warrant . . . ." *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985). The Ninth  
22 Circuit has held that the test applied to a border search of a vehicle is equally applicable to a search  
23 by customs agents of incoming mail: "[T]he mere entry alone into the United States from a foreign  
24 country is sufficient reason for a border search." *United States v. Barclift*, 514 F.2d 1073, 1075 (9th  
25 Cir. 1975). Here, CBP Officer Orozco performed an x-ray scan of the Package. Seventy-five percent  
26 of all packages processed at the San Francisco CBP Mail Facility are scanned by x-ray. Furthermore,

1 while an x-ray scan is a search for Fourth Amendment purposes, *United States v. Henry*, 615 F.2d  
2 1223, 1227 (9th Cir. 1980), “[officers] may . . . use scientific methods, such as x-rays . . . to detect . . .  
3 materials in the mail that may pose a grave risk to society.” *United States v. Gill*, 280 F.3d 923, 933  
4 (9th Cir. 2002).

5 It is unnecessary, however, to determine whether the warrantless opening of the Package may  
6 be justified by mere suspicion or reasonable suspicion because the opening of the Package comported  
7 to the higher standard of reasonable suspicion. *See Ramsey*, 431 U.S. at 623-34 (holding that  
8 reasonable suspicion that the parcel contained contraband is sufficient to justify a warrantless opening  
9 of a parcel under the border search exception). Here, the x-ray scan revealed to CBP Officer Orozco  
10 that there were pill-shaped items concealed inside an item shaped like a DVD player. CBP Officer  
11 Orozco understood that concealing such items suggests illegal activity, especially considering that  
12 controlled substances in the shape of small pills are often smuggled in illegally. This gave CBP  
13 Officer Orozco reason to believe that laws were being violated, and, with that belief, he opened the  
14 Package.

15 Accordingly, the court DENIES Defendant’s motion to suppress the evidence and fruits of the  
16 evidence obtained at the San Francisco CBP Mail Facility because the search does not violate the  
17 Fourth Amendment.

### 18 19 **B. Second Search: Warrantless Search of Defendant’s Apartment**

20 A search conducted without a warrant is presumed unreasonable. *Katz*, 389 U.S. at 357. In  
21 such a situation, it is the Government’s burden to prove that the warrantless search is reasonable.  
22 Here, the Government claims that exigent circumstances (i.e. that the evidence sought was in  
23 imminent danger of destruction) made it reasonable for the Government to search defendant’s  
24 apartment before obtaining a warrant. *See Kirk v. Louisiana*, 536 U.S. 635, 638 (2002) (entry of home  
25 unlawful unless both probable cause and exigent circumstances exist). For the Government to satisfy  
26 its burden by preponderance of the evidence, it has to prove that there was probable cause and that it

1 had a reasonable belief that exigent circumstances existed. *Kirk*, 536 U.S. at 638; *United States v.*  
2 *Matlock*, 415 U.S. 164, 177 (1974).

3 Determining probable cause is a two prong test. First, the court must determine the events  
4 leading up to the search. *Ornelas v. United States*, 517 U.S. 690, 695 (1996). Second, the court must  
5 decide “whether these . . . facts, viewed from the standpoint of an objectively reasonable police  
6 officer,” amount to probable cause. *Id.* at 696.

7 Accordingly, the following facts are pertinent. When the officers followed Defendant from the  
8 Golden Crown Market, where Defendant picked up the Package, to the Promenade area, where they  
9 lost sight of Defendant, they knew that Defendant had possession of the Package. Although the  
10 officers lost sight of Defendant in the Promenade area, Special Agent Duenas had caught up to  
11 Defendant right as Defendant entered the Liao Ti Tour Agency. Furthermore, officers identified the  
12 bicycle parked in front of the Liao Ti Tour Agency as one similar to Defendant’s bicycle. Ms. Huang  
13 confirmed that the bicycle belonged to Defendant. In addition, the Bird Dog, a directional frequency  
14 emitter, indicated that Defendant may have entered the tour agency. However, the officers waited  
15 outside the Liao Ti Tour Agency because they determined that the Package had not yet been opened.

16 However, once the officers believed the Package and the DVD player had been opened, they  
17 entered the Liao Ti Tour Agency but did not find Defendant. Then, based on questions answered by  
18 Ms. Huang and Ms. Huang’s body language, Special Agent Duenas concluded that Defendant’s  
19 apartment was B-3. An officer knocked on the apartment door and announced that they were law  
20 enforcement officers. After hearing noise on the other side, the officers forcibly entered and secured  
21 the apartment.

22 The Government contends that these facts amount to probable cause. Probable cause, in this  
23 context, is defined as “a fair probability that contraband or evidence of a crime will be found in a  
24 particular place.” *Illinois v. Gates*, 462 U.S. 213, 238 (1983). The court takes a “practical, common-  
25 sense” approach in determining whether probable cause existed. *Id.* As the U.S. Supreme Court made  
26 clear in *Gates*, “probable cause requires only a probability or substantial chance of criminal activity,

1 not an actual showing of such activity.”*Id.* at 245 n.13. “In dealing with probable cause, . . . as the  
2 very name implies, we deal with probabilities. These are not technical; they are the factual and  
3 practical considerations of everyday life on which reasonable and prudent men, not legal technicians,  
4 act.” *Id.* at 231 (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)).

5 Defendant contends that the Government lacked probable cause at the time of the warrantless  
6 search because Ms. Huang was not known to be a reliable informant. Specifically, Defendant claims  
7 that the officers did not know, at the time of the warrantless search, whether Ms. Huang had personal  
8 knowledge or was reliable. Defendant claims that the manner in which Ms. Huang was questioned  
9 suggests that the information would not be reliable.

10 The weight to be given to an informer’s tips is considered in the totality-of-the-circumstances  
11 analysis of probable cause. *Gates*, 462 U.S. at 238. “[E]ven if an informant does not disclose the basis  
12 for his information, police corroboration or the surrounding circumstances can support a  
13 determination of the informant’s reliability.” *United States v. Tarazon*, 989 F.2d 1045, 1049 (9th Cir.  
14 1993).

15 Here, Ms. Huang did not disclose the basis of her information. The Government did not ask  
16 Ms. Huang how she knew where Defendant lived. The Government did not claim that the officers  
17 were aware that Defendant worked at the Laio Ti Tour Agency. In fact, Major Cabrera testified that,  
18 although he was aware of it, he did not tell Special Agent Goward that the LIIDS report indicated that  
19 Defendant was employed by Liao Ti Corporation. No officer knew where Defendant lived. The only  
20 fact that corroborated Ms. Huang’s information was the shuffling noise Special Agent Goward heard  
21 coming from behind the door. However, there was no testimony regarding what kind of noise was  
22 heard and how loud the noise was. For example, no testimony suggested that the noise sounded like  
23 running water or a flushing toilet. With no other corroborating facts besides the scuffling noise, no  
24 reasonable police officer would believe that B-3 was Defendant’s apartment. *See Maryland v.*  
25 *Pringle*, 540 U.S. 366, 371 (2003) (quoting *Ornelas*, 517 U.S. at 695 (stating that probable cause  
26 must be “viewed from the standpoint of an objectively reasonable police officer”)).

1 Accordingly, the court GRANTS Defendant's motion to suppress evidence and fruits of the  
2 evidence obtained from the second search.

### 4 C. Third Search: Search Authorized by Warrant

5 Defendant claims that the warrant authorizing the third search was tainted as fruits of the  
6 illegal second search. The Government responds that the warrant is not tainted by the second search  
7 and even if it was tainted, the application of the independent source doctrine, as an exception to the  
8 exclusionary rule, permits the Government to use evidence obtained from the third search.

9 "[T]he Fourth Amendment . . . has traditionally mandated a broad application of the 'fruits'  
10 doctrine." *Oregon v. Elstad*, 470 U.S. 298, 306 (1985). The fruits doctrine requires that the court  
11 apply the exclusionary rule "not only to the illegally obtained evidence itself, but also to other  
12 incriminating evidence derived from the primary evidence." *Nix v. Williams*, 467 U.S. 437, 441  
13 (1984). However, "[t]he independent source exception to the exclusionary rule 'allows admission of  
14 evidence that has been discovered by means wholly independent of any constitutional violation.'"  
15 *Murray v. United States*, 487 U.S. 533, 544 (1988) (quoting *Nix*, 467 U.S. at 443). This means that  
16 "[w]hen an affidavit in support of a search warrant contains information which is in part unlawfully  
17 obtained, the validity of a warrant and search depends on whether the untainted information,  
18 considered by itself, establishes probable cause for the warrant to issue." *United States v. Alexander*,  
19 761 F.2d 1294, 1300 (9th Cir. 1985) (quoting *James v. United States*, 418 F.2d 1150, 1151 (D.C. Cir.  
20 1969)).

21 As stated above, probable cause, in this context, is defined as "a fair probability that  
22 contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213,  
23 238 (1983). Here, the only facts in the affidavit that are not tainted by the illegal search that suggests  
24 that the officers had reason to connect Apartment B-3 to Defendant is contained in paragraph 27:

25 A search of the area [of the Liao Ti Tour Agency] and questioning of a female subject  
26 in the Liao Ti business lead Special Agents to an apartment above the Guang Zhou

1 restaurant at the corner of Date [S]treet and Coral Tree [A]venue, directly across from  
2 the Dai Ichi hotel. The female subject directed agents to apartment B-3 located at the top  
3 of the stairs. Special Agents knocked on the door and announced their presence  
4 numerous times. Your affiant [Special Agent Goward] heard activity inside the  
5 apartment and in an effort to preserve the evidence forced entrance into the residence.

6 Like the court's determination above that the officers lacked probable cause for the  
7 second search, the court finds that after purging the tainted portion of the affidavit, there was  
8 no probable cause to issue the warrant. The most important information that ¶ 27 omits is the  
9 female subject's reliability and / or credibility. Paragraph 27 does not suggest any  
10 corroborating facts or facts supporting the female subject's personal knowledge to suggest  
11 that an objectively reasonable police officer" would find the female subject to be reliable.  
12 *Pringle*, 540 U.S. at 371.

13 Accordingly, the court GRANTS Defendant's motion to suppress the third search.

#### 14 V. CONCLUSION

15 FOR THE FOREGOING REASONS, the court DENIES Defendant's motion to  
16 suppress the first search, GRANTS Defendant's motion to suppress the second motion, and  
17 GRANTS Defendant's motion to suppress the third search. The court DENIES as moot  
18 Defendant's motion to suppress the second search and the third search based on violation of  
19 the Commonwealth Constitution.

20 DATED this 30th day of December, 2005.

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25 ALEX R. MUNSON  
26 Judge